ORIGINAL

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the matters of	)	
	)	
Application of	)	
	)	
CAPITOL RADIOTELEPHONE, INC. d/b/a CAPITOL PAGING	)	PR Docket No. 93-231
	)	
For a Private Carrier Paging Facility on 152.480 MHz in Huntington/Charleston, WV	)	
	)	
Imposition of Forfeiture re	)	
	)	
CAPITOL RADIOTELEPHONE, INC. d/b/a CAPITOL PAGING	)	
	)	
Former Licensee of Station WNSX646 in the PLMRS	)	
	)	
Revocation of Licenses of	)	
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CAPITOL RADIO TELEPHONE, INC. d/b/a CAPITOL PAGING	)	
	)	
Licensee of Stations WNDA400 and WNWW636 in the PLMRS	)	
	)	
Revocation of Licenses of	)	
	)	
CAPITOL RADIOTELEPHONE COMPANY, INC. d/b/a CAPITOL PAGING	)	
	)	
Licensee of Stations KWU373, KUS223, KQD614 and KWU204 in the PMRS	)	

To: The Review Board

CAPITOL RADIOTELEPHONE COMPANY, INC.
REPLY TO EXCEPTIONS OF PRIVATE RADIO BUREAU

Kenneth E. Hardman
MOIR & HARDMAN
2000 L Street, N.W., Suite 512
Washington, D.C. 20036
Telephone: 202-223-3772
Facsimile: 202-833-2416

Attorney for Capitol Radio-telephone Company, Inc.

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SUMMARY

Contrary to the PRB's allegations in the HDO, the evidence at the hearing overwhelmingly established, and Judge Chachkin so found, that Capitol was a victim of a relentless, anticompetitive campaign by RAM Technologies to keep from sharing the PCP channel with Capitol, not the perpetrator of any misconduct toward RAM. PRB's various assignments of legal and factual error are founded on mischaracterizations of Judge Chachkin's findings and conclusions, and on mischaracterizations and failure to acknowledge the overwhelming evidence of record supporting Judge Chachkin's decision. Analysis of PRB's arguments show that they are entirely meritless and should be rejected, and that the Initial Decision herein should be affirmed in all respects.

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To: The Review Board

REPLY TO EXCEPTIONS OF PRIVATE RADIO BUREAU

CAPITOL RADIOTELEPHONE COMPANY, INC. (a/k/a Capitol Radiotelephone, Inc. or Capitol Radio Telephone, Inc.) d/b/a CAPITOL PAGING ("Capitol"), by its attorney, respectfully replies to the exceptions filed by the Private Radio Bureau ("PRB") under date of November 30, 1994, to the Initial

Decision of Administrative Law Judge Joseph Chachkin (the "ID"), FCC 94D-12, issued October 21, 1994 and released October 31, 1994.[1] PRB argues its exceptions by mischaracterizing the findings and conclusions of the ID, and by simply ignoring or mischaracterizing the overwhelming evidence of record supporting Judge Chachkin's meticulous decision. Otherwise, PRB seems mainly preoccupied with protesting perceived criticism by the Judge of the way PRB has handled this case, rather than attempting to demonstrate reversible error. Accordingly, as Capitol shows below, PRB's exceptions are without merit in each and every material respect and should be entirely rejected.[2] As its reply thereto, Capitol respectfully shows:

COUNTERSTATEMENT OF THE CASE

This proceeding was brought at the request of PRB to revoke all of Capitol's radio licenses, alleging that

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[1] The other party to the proceeding, RAM Technologies, Inc. ("RAM"), did not file any exceptions. Accordingly, pursuant to Section 1.277 of the rules, 47 C.F.R. §1.277, RAM has waived any objection to any of the findings and conclusions in the ID ("Any objection not saved by exception filed pursuant to the section is waived").

[2] Capitol also notes that PRB has, without permission, exceeded the page limitation for exceptions by purporting not to count the summary section. On this basis alone, the exceptions should not be considered, and should instead be summarily dismissed, pursuant to Section 1.277(c) of the rules, 47 C.F.R. §1.277(c)("Except by special permission, the consolidated brief and exceptions will not be accepted if the exceptions and argument exceed 25 doublespaced typewritten pages in length. (The table of contents and table of citations are not counted in the 25 page limit; however, all other contents of and attachments to the brief are counted)"). (Emphasis added).

Capitol engaged in a plethora of serious rule violations during its operation of a Private Carrier Paging ("PCP") System on 152.48 MHz in West Virginia. The violations ranged from alleged "malicious[] ... interference" to RAM's co-channel PCP operations, on the one hand, to alleged "misrepresent[ion of] facts to the Commission and/or lack[of] candor", on the other hand.[3]

At the hearing, however, the evidence overwhelmingly demonstrated, and Judge Chachkin so found, that Capitol actually was a victim of a relentless, anticompetitive campaign by RAM to keep from sharing the PCP channel with Capitol. The evidence also overwhelmingly demonstrated, and Judge Chachkin so found, that Capitol was not the perpetrator of <u>any</u> improper conduct, much less conduct that warranted a forfeiture or license revocation. Accordingly, Judge Chachkin ordered that the Order to Show Cause and the Order of Forfeiture heretofore entered against Capitol be vacated and the proceeding terminated.

In its exceptions, PRB incredibly does not even acknowledge the possibility that it might have been duped by RAM, and that it targeted the wrong party for license revocation as a result. Instead, PRB simply continues to cling blindly to its original position that Capitol, rather

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[3] See Hearing Designation Order, Order to Show Cause and Notice of Opportunity for Hearing, FCC 93-381, adopted August 3, 1993 and released August 31, 1993, 8 FCC Rcd 6300 (FCC 1993) (hereinafter sometimes cited as the "Hearing Designation Order" or "HDO"), at ¶ 28.

than RAM, is the malefactor in this case. PRB purports to find multiple errors of law and/or fact by the Judge which, PRB contends, warrant reversal of the ID. PRB also complains of perceived criticism by the Judge concerning PRB's handling of the case, and claims that such criticism should be "stricken" for "go[ing] far beyond the scope of the record".

In point of fact, however, Judge Chachkin's decision is soundly rooted both in the law and the evidence of record, and PRB's arguments to the contrary -- to the extent they are even coherent -- do not survive even minimal scrutiny. Accordingly, they should be summarily and categorically rejected, and the ID should be affirmed in all respects.

REPLY ARGUMENT

I. Contrary to PRB's Argument, the ID Applied the Correct Legal Standard for "Willful Interference" and Properly Found as a Matter of Fact that Capitol Caused No Such Interference.

A. Legal Standard for "Willful"

Citing ¶¶80-81 of the ID, PRB first claims that the "ID acknowledges that there were instances in which Capitol's transmissions directly interfered with RAM's transmissions, but concludes that these cannot constitute 'willful' interference unless the evidence demonstrates that Capitol actually intended to interfere with or obstruct RAM's transmissions". (PRB Exc. at ¶3). PRB goes on to claim that "This standard is erroneous as a matter of law and

contradicts the Commission's finding on this issue in the HDO." (Id.) The argument is absolutely unintelligible.

In ¶¶80-81 cited as error by PRB, Judge Chachkin actually quotes the standard of willfulness stated in the HDO, as well as portions of the legislative history illuminating the meaning of "malicious" set forth in Section 333 of the Communications Act, 47 U.S.C. §333. Then, applying the exact standard that PRB says he must (i.e., the standard set forth in the HDO), Judge Chachkin goes on to find as a matter of fact that "the instances of Capitol 'walking' on RAM transmission during August 12-15, 1991, were not 'willful' or 'malicious' acts of interference". (ID at ¶82). Accordingly, even if PRB disagrees with Judge Chachkin's analysis of the evidence, PRB has not even come close to showing an error in the legal standard applied by the Judge.[4]

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[4] In this section PRB also claims vaguely to have shown "(1) that interfering transmissions occurred, and (2) that Capitol knowingly caused the transmissions". (PRB Exc. at ¶3 & p. 3). (Emphasis added). The underscored language in particular is ambiguous, and PRB does not trouble to elaborate or cite to the evidentiary record to support its position. In contrast, Judge Chachkin correctly found as a matter of fact that the Commission inspectors themselves "never were able to determine why Capitol occasionally 'walked' on RAM transmissions" and, indeed, that Inspector Walker himself "does not believe that Capitol knowingly transmitted while RAM was already on the air." (ID at ¶42). Judge Chachkin also correctly found as a matter of fact, which PRB totally ignores, that the explanation for such occurrences "probably is that transient factors such as local traffic, signal fades and the like, prevented Capitol's monitor from detecting RAM's signal in particular situations." (Id.).

B. "Excessive" Testing as Interference

Next, citing ¶¶84-86 of the ID, PRB claims that the ID "also concluded that 'excessive' testing, i.e., unnecessarily prolonged used of a paging channel to send test transmissions, does not constitute 'harmful interference' because it does not involve actual 'jamming' of or 'walking' on another licensee's transmissions." (PRB Exc. at ¶4). PRB claims this is a misreading of case law precedents which allegedly "support the proposition that prolonged use of a channel for purposes other than legitimate messaging or testing may constitute 'harmful interference' whether or not it occurs 'on top' of transmissions by the other licensee." (Id.).

PRB's argument is a flagrant mischaracterization of the ID. What Judge Chachkin actually held at ¶86 of the ID is that PRB's position is unsupported by the cases they cite; and PRB has improperly twisted that holding into an allegedly erroneous finding that the ID simply did not make.

Equally important, the ID also explicitly and correctly found that the factual predicate for PRB's claim is wholly unwarranted. That is, PRB's claim of Capitol's "prolonged use of a channel for purposes other than legitimate messaging or testing" is entirely misplaced as a factual matter, because Judge Chachkin explicitly found, in relevant part, that the "uncontradicted evidence establishes" that

Capitol's "tone transmissions were bona fide test transmissions" (ID at ¶82), and that:

> "even if it is assumed, arguendo, that 'excessive testing' could be a form of 'harmful interference' within the meaning of Section 90.403(e) of the rule or Section 333 of the Communications Act, the evidence in this case establishes that the testing engaged in by Capitol ... does not come close to rising to such level." (ID at ¶91). (Emphasis added).[5]

In short, PRB's argument is wrong on all counts: Judge Chachkin did not actually make the finding PRB now alleges to be error, and the factual predicate for its claim of error is wholly unfounded and erroneous.

C. "Evidence" of Operation in November 1990

Next, PRB claims, extravagently, that "The Evidence Shows Capitol Was Operational as of November 1990", contrary to the finding of the ID (PRB Exc. at p. 4), and that the ID's finding is "base[d] ... solely on the uncorroborated written testimony of J. Michael Raymond". (Id.). Again, PRB's factual statements are simply false. PRB fails to point out that Judge Chachkin found that RAM's interference complaints against Capitol (including the November 1990 incident) "were actually products of a predetermined campaign [by RAM] to drive Capitol from its licensed PCP channel" (ID at ¶65), and that the 1990 incident "was

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5 PRB's citation to Henry C. Armstrong, III, 92 FCC 2d 485 (Rev. Bd. 1983), and Gary W. Kerr, 91 FCC 2d 107 (Rev. Bd. 1982) is thus misplaced on their facts, because the uncontradicted evidence in this case is that Capitol never transmitted for more than brief periods at a time before relinquishing the PCP channel for use by other licensees.

actually an incidence of intermodulation for which Capitol was not at fault, not an instance of interference by Capitol to RAM." (ID at ¶70). Neither of these findings rely on Raymond's testimony for support.[6]

Even more egregiously, PRB's extravagent claim about the evidence on this point actually reduces to an inference (and not evidence) PRB would draw from Raymond's declaration in November 1990 categorically denying RAM's interference allegations. (See PRB Exc. at p. 5 & ¶5). PRB also fails to point out that this issue was fully ventilated on the record (Raymond Tr. 965-967), during which time Judge Chachkin correctly rejected an identical argument by RAM:

> "JUDGE CHACHKIN: * * * I mean, I don't understand what we're quibbling over. It was a categorical denial of ... causing interference. Now, what more is there to say?" (Id. at 967).

In short, there is in fact no inconsistency at all between Raymond's 1990 declaration and the evidence adduced at trial, much less any probative evidence as claimed by PRB to show that Capitol was operating the PCP in November 1990 (which it was not).

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[6] PRB also erroneously fails to note that Raymond also testified on this point at the hearing, both during direct testimony and during cross-examination by the adverse parties (e.g., Raymond Tr. 813-4, 1013, 1303-4). Judge Chachkin expressly found that Raymond's testimony (and that of the other Capitol witnesses) was "forthcoming and entirely believable". (ID at ¶105).

D. "Evidence" of Interference in August 1991

Next, PRB claims that the ID's finding of no willful interference during August 1991 "flies in the face" of the "clear evidence provided by FOB field engineers who monitored Capitol's transmissions". (PRB Exc. at p. 5 & ¶6). The core of PRB's claim is its assertion, first, that "FCC field engineer Walker indicated that, based upon his experience, the duration of the tones was too long to reflect legitimate testing," citing Tr. 112. (PRB Exc. at p. 6 & ¶8).

The quoted PRB claim is an absolute fabrication of the record. In fact, all Witness Walker said in the cited passage is that the duration of the tones seemed longer than other paging tones he had monitored at other times; he did not testify that the tones were not legitimate testing. In contrast, at other points in his testimony, he admitted that the tone transmissions were legitimate test transmissions, notwithstanding his view that the amount of testing involved was excessive (Walker Tr. 130, 180); and at other times he admitted that he did not believe Capitol knowingly transmitted while RAM was transmitting. (Walker Tr. 172).

The second core part of PRB's claim is its assertion that Walker "stated that he did not consider what he heard to be testing, and that he had never heard testing of such duration." (PRB Exc. at p. 6 & ¶8). However, the most that can be said about the cited testimony is that it is ambig-

uous and by no means compels the conclusion urged by PRB. At a minimum, PRB's inference from his cited testimony is fatally undercut by his other testimony, cited above, and in any event hardly constitutes the "clear evidence of interference" claimed by PRB.[7]

Finally, in this regard, at p. 8 & ¶12 PRB also claims (erroneously) that Judge Chachkin never acknowledged the prior relationship between Capitol and Arthur K. Peters -- whose credentials as an expert in the paging industry have never been questioned by PRB and are not challenged in its exceptions. In fact, of course, and absolutely contrary to PRB's statement, Judge Chachkin explicitly acknowledged Peters as Capitol's "long standing consultant". (ID at ¶53). PRB thus has shown no error in Judge Chachkin's weighing of the evidence offered by Witness Peters.

E. Capitol's "Inhibitor"

Next, PRB claims that Capitol's use of its "inhibitor" does not constitute a sufficient precaution to avoid co-channel interference, allegedly because (1) the HDO so ruled and because (2) licensees allegedly must take additional steps "if interference occurs notwithstanding monitoring".

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[7] In this section PRB also attempts to make much of Walker's suspicions of Capitol during the inspection. In addition to distorting the evidence of record to support its argument, PRB fails to note that its theory was fully ventilated in the record (Tr. 1444-1456), during which time Judge Chachkin concluded that the adverse inference sought to be drawn by PRB is "reaching" and "speculation" (Tr. 1453), and simply "doesn't make sense". (Tr. 1455).

(PRB Exc. at ¶13). This is another argument that is truly beyond the pale.

What the HDO actually asserted was that Capitol's inhibitor "consisted of a modified scanning receiver with a totally functioning front panel squelch control," which the HDO claimed "is significant because the squelch setting affects whether the receiver detects a signal" -- i.e., whether the inhibitor actually functions as required. (HDO at ¶12 & n. 23). The HDO went on to state that:

> "[t]he existence of <u>such a device</u> [i.e., a modified scanning receiver with a totally functioning front panel sqelch control] does not mitigate the charge of harmful interference * * *" (HDO at ¶12). (Emphasis added).

What the evidence at the hearing showed, of course, is that the FCC inspectors jumped to an erroneous conclusion in so characterizing Capitol's inhibitor (See Walker Tr. 163, 1480; CAP-21); and that in fact Capitol's inhibitor functioned as a "fixed tuned receiver" (CAP-21), which the HDO otherwise acknowledges to be a reliable method of providing for transmitter inhibitor circuitry. (HDO at ¶13 & n. 23). PRB has <u>never</u> challenged this evidence concerning Capitol's inhibitor, and cannot now be heard to claim that findings based on such evidence are foreclosed by the HDO.

PRB's claim that such inhibitor is otherwise inadequate is equally bizarre. Judge Chachkin found, and PRB acknowledges, that the FCC inspectors never told Capitol during the inspection that its transmissions were interfering with

RAM;[8] and there is absolutely no other evidence that Capitol should have known that its inhibitor was not functioning properly. In short, there is absolutely no logical or legal support for PRB's position that an industry standard practice engaged in by Capitol (i.e., using a fixed tuned monitor receiver to "inhibit" a transmitter from operating when a co-channel signal is detected) is not adequate to defend against a charge of willful interference.

F. The "Competition" Between RAM and Capitol

Next, PRB makes a thoroughly muddled and sophomoric claim that the ID improperly contradicted findings by the HDO concerning the existence of competition between RAM and Capitol. (PRB Exc. at pp. 9-12 & ¶¶14-17). PRB further asserts that the ID's conclusions in this regard are inconsistent with its findings concerning RAM's motivations in this case. (Id. at p. 12 & ¶17).

Contrary to PRB's characterization, of course, what Judge Chachkin actually did was carefully analyze the facts in the case and conclude that PRB failed to show any

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[8] ID at ¶45. PRB tacitly acknowledges the correctness of this finding because it otherwise complains that "the [FCC] engineers [conducting the inspection] in fact had no duty to communicate such information". (PRB Exc. at p. 21). (Emphasis added). The point relevant here, of course, is that if Capitol has no reason to believe its inhibitor is not working properly, it cannot reasonably be expected to take additional measures to prevent interference. Accordingly, PRB's purported reliance on Nu-Page of Winder, 6 FCC Rcd 7565 (FCC 1991), and Texidor Security Equipment, Inc., 4 FCC Rcd 8694 (FCC 1989), is plainly misplaced on their facts.

credible motive for Capitol to engage in the improper behavior alleged by PRB. (ID at ¶¶56-60). One of the factors involved in his analysis (but not by any means the only factor) is his conclusion, based on the uncontradicted evidence of record, that it would have been pointless from a competitive standpoint for Capitol to have attempted drive RAM's customers off of its PCP system, because such customers would not then have become customers of Capitol's RCC system due to the price of Capitol's RCC service. (Id. at ¶57). The short answer to PRB's argument thus is that nothing in the HDO, or the evidence, or marketplace realities, undercuts such an obvious and elementary proposition.

Insofar as RAM's motives are concerned, what the ID actually found is the obvious fact that:

> "channel sharing reduces the amount of channel-time available to the sharing entities. In light of RAM's large number of subscribers, it is clearly in RAM's economic interest to have the channel all to itself, rather than to share the channel with a competitor such as Capitol." (ID at ¶63).

Accordingly, the critical fact that supplied RAM's incentive in the case is that it had to share the channel with Capitol at all (thereby effectively reducing its own system capacity), wholly irrespective of whether Capitol competed with RAM or not. The fact that the sharing entity was a PCP system that was intended to compete with RAM's own PCP system merely underscored and heightened RAM's economic

incentive to avoid sharing the channel. Thus, there is in fact no inconsistency at all between the ID's finding that Capitol's RCC system served a different market niche than RAM, and that RAM had a clear incentive to avoid channel sharing with Capitol.

G. Alleged "Self-Contradictory" Testimony

Next, PRB asserts, again extravagently, that the "ID fails to account for numerous instances in which Capitol's responses to allegations of intereference were inconsistent and inherently incredible". (PRB Exc. at p. 12 & ¶18). However, PRB's argument muddles different allegations of interference together and purports to find contradictions by citing testimony that was addressing another subject altogether. For example, PRB cites Raymond testimony at Tr. 1340 in connection with the allegation concerning November 1990 (id.), but that testimony actually dealt with Raymond's inability to explain why Capitol occasionally "walked" on RAM's transmissions in August 1991 notwithstanding that Capitol's inhibitor was in place and functioning.

Even more egregiously, PRB simply fabricates the claim that Witness Walker tesified that "intermodulation could not have been the cause" of the November 1990 interference, and does so without troubling to make any citation to the record whatsoever. (PRB Exc. at p. 13 & ¶19). In fact, the evidence on this point is carefully outlined and weighed at ¶19 & n. 9 of the ID. No such categorical testimony was

given by Witness Walker, and the ID's reasons for crediting the testimony of Witness Peters are fully documented.[9]

H. Weighing of the Testimony

Next, PRB claims, again without any citation to the record whatsoever, that the testimony of the FCC inspectors "corroborated the testimony of RAM's witnesses" and asserts that the ID is "clearly inaccurate" for finding that "'No evidence from a disinterested witness corroborated RAM's charges'". (PRB Exc. at p. 14 & ¶21). On this basis PRB claims that the ID erred in crediting the testimony of Capitol's witnesses and failing to credit the testimony of the RAM-affiliated witnesses.

PRB's assertion of corroboration is another outrageous fabrication. None of the RAM witnesses gave any testimony concerning the period of August 12-15, 1994, when the FCC inspectors conducted their monitoring; and, insofar as here pertinent, the FCC inspectors only testified about the August 1991 period. The ID thus was obviously correct in finding that the FCC inspectors did not corroborate the testimony of RAM-affiliated witnesses.[10]

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9 In a similar vein, PRB cites Tr. 452 and 455 to support its assertion that "the retransmission of Capitol's common carrier traffic on a PCP channel could only have been caused by Capitol." (Id.). In fact, however, the cited testimony does not even come close to supporting PRB's claim, much less establish it conclusively.

10 Also, contrary to PRB's claim, the testimony of its inspectors did in fact corroborate the testimony of the Capitol witnesses in crucial respects, thereby enhancing their credibility. For example, Witness Bogert corroborated

I. Failure to Call Stone as a Witness

Next PRB cites as error Judge Chachkin's refusal of PRB's "request[] that Capitol produce William D. (Dan) Stone, Capitol's president, for cross-examination at the hearing." (PRB Exc. at p. 14 & ¶22). Of course, PRB wholly fails to note that Capitol never listed Stone as a witness, and thus a request to produce him for cross-examination simply did not lie. By contrast, if PRB felt Stone had material evidence, it was incumbent on the Bureau to list him as part of its direct case, which it did not do. This matter also was fully ventilated on the record (Tr. 44-46), and PRB offers nothing to show error in Judge Chachkin's obviously correct ruling.

As to the claim of material evidence that Stone might have provided, Stone's presence at the inspection adds nothing to the record,[11] and PRB's newly professed belief

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Raymond's testimony that the reason for the slow station identification was Capitol's good faith reliance on the correctness of the factory settings on its equipment, and not some plot to interfere with RAM. (See ID at ¶100). Also, Witness Walker acknowledged the existence of intermodulation at other times, thereby corroborating Witness Peters' opinion that the November 1990 interference was a product of intermodulation. (See ID at ¶19 & n. 9).

11 Four persons present at the inspection of Capitol testified at the hearing: Witnesses Raymond, Harrison, Walker and Bogert. PRB therefore was not handicapped in any way in bringing out any relevant evidence about what happened at the inspection. Moreover, Witness Walker could not remember crucial aspects of his interchange with Stone during the inspection (ID at ¶46). If Walker could not remember exactly what was said despite the fact that it was his job to conduct the inspection, it is ludicrous to suppose that Stone's testimony would have been any more

that he prepared a list of Capitol PCP customers is both absurd on its face and irrelevant.[12]

PRB also egregiously misapplies precedent and related authority when it claims that an adverse inference should be drawn from the failure of Stone to testify. (PRB Exc. at p. 15 & ¶22). As the cases which it cites make clear,[13] such an inference may be appropriate if the party against whom the inference is drawn has the burden of proof. See Lee Optical, supra, 2 FCC Rcd at 5486 & ¶21 ("After all, C.E. had the burden of proof ... and must bear the consequences of failing to introduce evidence which might have been helpful to it"); see also 70 FCC 2d at 1041. In this case PRB has the burden of proof on all issues and cannot invert or shift that burden by attempting to draw adverse inferences from an alleged failure by Capitol to introduce testimony.

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helpful to PRB. Furthermore, PRB's attempt to infer something sinister about what happened at the inspection was otherwise ventilated on the record (Tr. 1444-1456), and Judge Chachkin concluded, quite correctly, that PRB's theory simply "doesn't make sense". (Tr. 1455).

12 PRB never mentioned this belief when the matter was brought up at the hearing (Tr. 43-46), and it is implausible on its face that Stone, Capitol's President, would be the one performing a menial task such as compiling a list of PCP customers.

13 Lee Optical, 2 FCC Rcd 5480 (Rev. Bd. 1983); WNST Radio, Inc., 70 FCC 2d 1036 (Rev. Bd. 1978).

J. RAM's Misconduct

Perhaps the most preposterous of all is PRB's argument that RAM's misconduct in this case, which was carefully documented in the ID,[14] is "legally irrelevant to the matter at issue". (PRB Exc. at pp. 15-16 & ¶23). At a minimum, of course, the cynicism on RAM's part evidenced by its willingness to engage in such tactics goes directly to the credibility of the testimony offered by the RAM-affiliated witnesses, as the ID properly concluded. (ID at ¶66).[15]

Moreover, under the facts of this case, evidence of RAM's misconduct is relevant in yet another respect -- that of establishing an alternative explanation for the theory advanced by PRB. Not to belabor the obvious, but Capitol is plainly entitled to show that it is the victim of misconduct by RAM, rather than the perpetrator of misconduct against RAM, as a defense to PRB's charges. Yet PRB incredibly

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14 RAM's misconduct included (a) abuse of the FCC's processes by launching a "paper war" at the Commission as part of RAM's "calculated course of conduct to prevent Capitol from ever getting a license in the first instance, or to drive it off the frequency if ever licensed" (ID at ¶61); (b) deliberately disabling its own "inhibitor" in March 1991 in order to blot out Capitol's PCP transmissions when it attempted to initiate commercial PCP service (ID at ¶24); and (c) equipping RAM's PCP with a "'two-minute time-out' device" during August 1991 with knowledge that use of such device was unlawful (ID at ¶41).

15 The Commission has expressly acknowledged that a party's willingness to engage in such conduct "threatens the integrity of the Commission's licensing processes" and reflects adversely on the "truthfulness" and "reliability" of such party. Character Qualifications, 102 FCC 2d 1179, 1209, 1211 (FCC 1986).

professes to believe that such a showing is "legally irrelevant" nonetheless.[16]

II. PRB's Attempted Defense Against the Perceived Criticism of its Handling of the Case Is Wholly Meritless.

As much as anything in its exceptions, PRB seems intent on defending its handling of the case against perceived criticism in the ID. (PRB Exc. at pp. 16-23 & ¶¶24-34). As usual, PRB's arguments are largely distortions of the ID and, even if they were otherwise accurate (which they are not), would not establish any reversible error in the ID on the issues designated for hearing. Therefore, a detailed analysis of this section is unwarranted, but Capitol will highlight some of the more egregious errors contained therein.

First, whether or not PRB was evenhanded up to the time Capitol tried to start commercial PCP service (id. at pp. 16-19 & ¶¶24-28), is quite besides the point. The point is that when RAM started filing its interference complaints at the FCC, Capitol consistently denied those complaints and adduced evidence that RAM was simply trying to drive Capitol off the licensed PCP channel. It was at that point that the

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16 It is doubtlessly true, as PRB claims, that "self help" and "vigilante tactics" may not properly be used in response to another party's misconduct. (PRB Exc. at p. 16 & ¶ 23). However, the argument is obviously misplaced as applied to Capitol, because there is no evidence whatsoever that Capitol engaged in any such tactics. On the other hand, there is ample evidence, and the ID so found, that RAM engaged in just such tactics -- misconduct which PRB myopically dismisses as "irrelevant to the matter at issue".

record demonstrates PRB turned a "deaf ear" to Capitol. Obviously, the fact that PRB may have done its job properly up to that point does not exculpate it for its subsequent conduct.

Second, PRB's ruling on the applicability of the "three minute" rule to RAM (id. at pp. 18-19 & ¶27) is significant primarily because at the time PRB made its ruling the only information before it was that RAM's system was in fact interconnected or could be so interconnected at any time.[17] Therefore, making a ruling on such a crucial matter, without at least a more careful investigation and explanation of the true situation, is simply another illustration of at least shoddy work by PRB.

Third, PRB entirely misses the point of the ID's finding that the inspectors did not advise Capitol, at the time of their inspection, that they had observed Capitol occasionally "walking" on RAM's transmissions. Obviously, if Capitol was not aware that there was a problem with its transmissions notwithstanding that the "inhibitor" was in place and functioning, then Capitol can hardly be faulted for any interference caused by such transmissions. That is the reason the ID made the finding -- not to criticize the FCC inspectors.

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17 PRB improperly speculates that RAM's system was not in fact "interconnected" under governing FCC policy, despite its radio license. (Id.). The hearing simply did not delve into the question of whether RAM's system is "interconnected".

PRB similarly misses the point entirely of the finding that RAM's most serious complaints of interference to the FCC were not contemporaneously served on Capitol. The basic point, of course -- as with the inspectors' monitoring -- is that if Capitol is not advised that there is a problem in the first place, it cannot fairly be faulted for failing to correct any such problem.

Moreover, PRB is simply wrong when it claims that notice to Capitol of such complaints was not legally required. (Id. at p. 21 & ¶32). The HDO held that RAM's petition for reconsideration of Capitol's grant remained pending before the Commission from August 1990 until issuance of the HDO in 1993; and the Commission's ability to immediately terminate the PCP license was based upon the continued pendency of that petition for reconsideration. (HDO at ¶21). Under such circumstances, RAM's complaints to PRB plainly were also improper ex parte communications in a restricted adjudicative proceeding (See 47 C.F.R. §1.1208), as well as fundamentally unfair to Capitol.

Finally, in this regard, PRB is completely wrong when it criticizes the ID's use of the Basham declaration included in CAP-12. (PRB Exc. at pp. 22-23 & ¶34). As a preliminary matter, it is at least curious that PRB now suggests that Mr. Basham has "retracted" his allegations (id. at p. 23), because there was no mention of any such alleged retraction at the time the declaration was discussed